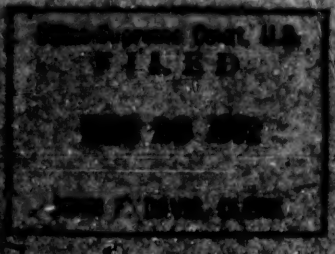

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 430

ARROW TRANSPORTATION COMPANY, ET AL., PETITIONERS

v.

SOUTHERN RAILWAY COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of the Court, dated October 15, 1962, inviting the Solicitor General to set forth the views of the United States. The Interstate Commerce Commission does not join in the conclusions herein expressed.[1]

OPINIONS BELOW

The opinions below have not been officially reported. The memorandum opinion of the district

[1] It is the opinion of the Commission that the language and history of Section 15(7) of the Interstate Commerce Act show a congressional purpose to put proposed rates into effect upon the expiration of the statutory suspension period unless the Commission, after hearings, has finally found the rates to be unlawful.

court, dated August 2, 1962, appears at R. 52–55. The district court's findings of fact, conclusions of law and order denying petitioner's motion for preliminary injunction, dated August 3, 1962, appear at R. 55–58. The opinion of the court of appeals and its judgment of affirmance were entered on September 7, 1962, and appear, respectively, at R. 116–125 and R. 126.

JURISDICTION

The petition for a writ of certiorari was granted on October 15, 1962 (R. 143). The judgment of the court of appeals was entered on September 7, 1962 (R. 126). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

The applicable provisions of the Interstate Commerce Act, as amended, are Section 15(7), 49 U.S.C. 15(7); Section 22(1), 49 U.S.C. 22(1); and the National Transportation Policy, preceding 49 U.S.C. 1. The texts of these statutes, together with relevant prior versions of what is now Section 15(7), are set forth in the Appendix, *infra*, pp. 47–52.

QUESTION PRESENTED

Whether a District Court is powerless to prevent extreme and irreparable injury to shippers, port cities, and competing barge lines by temporarily enjoining a railroad from putting rates into effect until the Interstate Commerce Commission can complete an investigation and render a final decision as to their lawfulness in a situation in which the Commission

has suspended the proposed rates on the ground that "there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *," but has been unable to complete its investigation within the suspension period and is without further power to suspend the rates.

STATEMENT

In 1961, the respondent railroads filed with the Interstate Commerce Commission a schedule of drastically reduced rates for the transportation of grain in multiple car shipments from certain Mississippi and Ohio River ports to specified destinations in the Southeast. The proposed rates—which are fixed at three levels, applicable to five, ten, and twenty car shipments, respectively—average less than 40 percent of the rates currently in effect between the same points (R. 36). On complaint by competing barge lines and other parties, the Commission entered an order on August 7, 1961, finding that "There is reason to believe that they [the tariffs] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * * ", and suspending the effectiveness of the pro-

posed tariffs for the maximum statutory period of seven months pursuant to Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The Commission initiated a proceeding entitled Docket No. I. & S. 7656, *Grain in Multiple Car Shipments—River Crossings to the South,* and scheduled hearings to begin in October 1961 (R. 56–57).

To compensate for postponement and interruption of the hearings by respondent Southern, the railroads twice agreed to extend the suspension period, first to July 7, 1962, and then to August 7, 1962. Thereafter, however, they refused to comply with requests by petitioners for a further extension (R. 57). Petitioners then filed a complaint in the district court seeking a temporary injunction to maintain the *status quo* and to restrain the railroads from applying the proposed rates to the transportation of grain until the Commission could rule on their lawfulness (R. 4–15). Southern filed an answer (R. 48–52) and a motion to dismiss (R. 47). Supporting affidavits were filed on behalf of petitioners, and counter-affidavits on behalf of Southern. Briefly summarized, the substances of the allegations contained in these affidavits was as follows:

Petitioner Arrow Transportation Company is a common carrier by water, operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission (R. 32). It alleges that a major part of its traffic—providing 68 percent of its tonnage and 80 percent of its revenues—consists of the movement of grains to Tennessee River ports, such as Guntersville, Alabama, from which four-

fifths of the grain is then reshipped by land carrier to various processing and consuming points in the Southeast (R. 32–33). The currently effective all-rail rates for carrying grain from Mississippi and Ohio River ports (such as St. Louis and Evansville) to destinations in the Southeast (such as Atlanta and Birmingham) are substantially higher than the combined rates for transporting such grain from those ports by barge to the mills and elevators at Guntersville and then reshipping it by rail to the same destinations. However, the proposed multiple car rail rates (which, according to Arrow (R. 41–43) are either below or only slightly above Southern's out-of-pocket costs and uniformly below the out-of-pocket costs of all the other respondent railroads) will be considerably less than the combined barge-rail rates (R. 35–36). The application of these proposed rates, Arrow maintains, will cause it an immediate loss of revenues; and if the rates continue in effect long enough to permit other grain buyers to equip themselves for receiving multiple car shipments, Arrow will be forced to cease its operations on the Tennessee River, surrender its certificate of public convenience and necessity, and liquidate its assets (R. 33–34).

Petitioner, City of Guntersville, Alabama, is a Tennessee River port and the site of a number of grain elevators, grain merchandisers, feed mills and related businesses which depend on inbound barge transportation as the chief means of receiving interstate shipments of grain (R. 6–7). It alleges that its economic welfare is largely dependent on this grain industry; that the proposed multiple car rate will "seriously han-

dicap, if not actually eliminate," the barge transportation of grain to Guntersville; and that unless enjoined, these rates will have a "devastating effect" on the economy of the city (R. 40–41).

Petitioner O. J. Walls (d/b/a O. J. Walls Company, a corporation) is actively engaged in buying and merchandising grain in Guntersville. He alleges that the proposed multiple car rates will drastically reduce the quantities of grain handled through his elevator and, if allowed to remain in effect for more than a few months, will force him out of business. He further represents that 30 percent or more of his sales are to customers at various destinations in the Southeast who are equipped to receive multiple car shipments; that most of these customers have informed him that as soon as the proposed rates go into effect they will immediately abandon purchases of barge-rail grain from him and rely on the cheaper multiple car rates; and that he himself is not equipped to receive multiple car shipments and, even if he were, would still be underpriced because of the high transportation charge beyond Guntersville to the areas of consumption (R. 43–46).

Petitioner John D. Bagwell Farms and Hatchery, Inc. is engaged in the production and sale of broilers (poultry). It is not located on a railroad, and thus is almost exclusively dependent on low-cost barge grain, which it picks up in Guntersville, transports 65 miles to its plant in its own trucks, and there grinds into feed for the broilers. Bagwell alleges that its major competitors, large national concerns,

are presently equipped to receive multiple car shipments of grain; that, if the proposed rates go into effect, those concerns will be in a position to exploit the rates immediately and hence substantially undersell Bagwell; and that Bagwell will thus be faced with a choice between suffering serious and immediate competitive disadvantage, or investing approximately $150,000 in rail facilities which will become useless if the Commission later declares the rates unlawful (R. 38–39).

In response to these claims, Southern Railway Company alleges, among other things, that 45 percent of the grain moving to the Tennessee River ports is actually processed there, and that the railroads will be in no position to divert the traffic in such grain from the barges (R. 20-21); that most of the barge traffic in grain originates in areas which Southern Railway does not serve and from which no reduced multiple car rail rates are proposed by any rail carrier; that the proposed multiple car rates from St. Louis and Evansville to Guntersville are higher than the published barge rate between those points; and that Southern is prepared to publish its proposed rates from Chattanooga and is confident that respondent Louisville and Nashville Railroad, in order to meet Southern's competition, will publish its own multiple car rates from Guntersville (R. 17, 19–21). Southern also contends that the railroads must compete with unregulated motor carriers in many areas from which the barges do not operate; that the proposed rates, far from being unprofitable, will in fact

provide revenues that are more than 140 percent of costs; and that they have the support of the Southern Governors' Conference, the Southeastern Association of Railroad and Utilities Commissioners, the United States Department of Agriculture, and numerous receivers and processors all over the South (R. 19–22).

Affidavits opposing the requested relief were also filed by a feed mill located in Guntersville (which represented that it and other Guntersville concerns would continue to use barge transportation) (R. 26–27); a flour mill in North Carolina (which indicated that substantial cost savings would be made available to shippers by the proposed multiple car rates) (R. 28–30); and by a spokesman for the Southern Governors' Conference and the Southeastern Railway Association of Railroad and Utility Commissioners (who urged that delay in making reduced rail rates effective was resulting in irreparable damage to Southern producers, processors, and consumers) (R. 30–32).

On August 2, after a hearing in which all parties relied upon the affidavits and pleadings, the district court filed a memorandum opinion (R. 52–55) stating that "the ends of justice would be best served by granting temporary injunctive relief for a limited period of time," but disclaiming jurisdiction to grant the requested injunctive relief. A day later, the court entered findings of fact, conclusions of law and an order (R. 55–58), in which it found that "[t]here is grave danger that irreparable injury, loss or damage may be inflicted on plaintiffs if the proposed

rates go into effect * * * for which plaintiffs will have no adequate remedy at law," but concluded that the courts are without authority to enjoin the effectiveness of common carrier rates before a final order by the Commission.

Petitioners filed a notice of appeal (R. 61) and obtained a temporary restraining order pending a hearing before the Court of Appeals for the Fifth Circuit (R. 67). On August 8, 1962, the court of appeals denied petitioners' motion for an injunction pending decision on the appeal, but continued the restraining order to give petitioners an opportunity to seek relief from this Court (R. 100). On August 17, 1962, Mr. Justice Black extended the temporary restraining order pending final decision in this Court on the question of the district court's jurisdiction (R. 101–105). On September 7, 1962, the court of appeals entered its opinion (R. 116–125) and judgment (R. 126) affirming the district court but staying issuance of its mandate for 21 days. On September 26, Mr. Justice Black ordered that the status quo be preserved "pending final disposition in this Court of all matters in all the proceedings in this case or cases * * *."

INTRODUCTION AND SUMMARY

Petitioners are asking this Court to provide an extraordinary remedy—extraordinary not only in the sense that an injunction traditionally requires a special showing—but extraordinary also in that its grant might seem at first blush a departure from the statutory scheme which Congress enacted. To say so

much is to affirm that petitioners have a heavy burden to sustain. It is to say also that if equitable intervention is to be justified at all in circumstances where the administrative remedy afforded by the Interstate Commerce Act has been exhausted, the availability of a judicial remedy is to be very narrowly circumscribed, that is to say, confined to the case in which there is the most compelling proof of need—proof going far beyond what would normally constitute a sufficient showing of irreparable injury.

For the generality of cases, the statutory scheme seems plain enough. A carrier files new rates, and the Commission, after making a preliminary examination of the carrier's justification for its proposed changes, makes an expert judgment whether they should be suspended, *i.e.,* held in abeyance for a period of no longer than seven months. Thus, the Commission decides, in the first instance whether the rate is to be suspended at all. If it concludes that the rate is *prima facie* lawful, the carrier is free to put it into effect at once. If it concludes otherwise, it may restrain the carrier, *pendente lite,* but not for a period in excess of seven months. Hopefully, the administrative proceedings will be completed during this period. If this expectation is not fulfilled, the carrier may nonetheless begin to collect the questioned charges, subject however, to the duty to make redress if it should fail to prevail on the merits. In this situation—the situation, incidentally, upon which Congress focused its attention when it enacted the provision for suspension of rates—there is plainly no occasion for judicial intervention even though the Commission

has not yet determined the lawfulness of the new rates. The district court does not come into the picture until the Commission promulgates its order disposing of the merits of the controversy, at which point, of course, any aggrieved party may seek judicial review.

The arrangement doubtless represented a compromise. The carrier normally desires, for obvious reasons, to put its changed rates into effect as promptly as possible; the rates cannot be collected until they become effective and what is lost during a period of delay cannot be recouped. The shipper (or a competing carrier) who claims that the rates are unlawful and that he will be injured thereby has a directly opposing interest: to forestall the evil day. This is so even though he has a remedy, by way of damages or reparations, in the event that the rates go into effect and are subsequently held unlawful. A remedy later—especially one which may prove imperfect, cf. *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, No. 48, this Term, December 3, 1962—is less appealing than the avoidance of injury now. For seven months the shipper is protected—assuming the Commission finds reason to believe the rates would be unlawful—even though the carrier may suffer injury from the delay in putting into effect what may ultimately prove to be lawful rates. After seven months the burden is put on the shipper and competing carriers. The shipper is required to pay charges that may ultimately turn out to be unlawful. The alternate carrier may suffer from unlawful competi-

tion. In both cases substantial irreparable injury may ensue. The shipper may suffer not only higher costs, but a loss of markets scarcely susceptible of proof. The competing carrier may lose unascertainable amounts of traffic. But although this kind of irreparable injury will normally support an application for equitable relief, it is insufficient, in our view, to warrant a judicial injunction suspending the effectiveness of a carrier's proposed rates beyond the seven-month period of administrative suspension authorized by the Interstate Commerce Act. Congress can hardly have failed to perceive that substantial and sometimes irreparable hardship was bound to fall upon one side or the other. The courts should not upset the balance that Congress struck.

The difficult problem arises when there is a showing of truly extraordinary injury such as Congress apparently failed to anticipate. Suppose, as is claimed here, putting the proposed rail rates into effect would probably destroy the petitioner barge line, as well as cause gross discrimination against shippers and localities, before the Commission was able to complete the administrative proceeding and finally determine the legality of the rail rates.[2] Immediately, two points are to be noted. *First,* the Commission, in suspending the rail rates, found that "[t]here is reason to believe that they would, if permitted to become

[2] We intimate no view as to the correctness of the petitioners' allegations, noting only that they appear to have been accepted in the district court's findings and that they must be assumed correct for the limited purpose of deciding the issue of the district court's jurisdiction.

effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *" (R. 56–57). *Second*, Congress, in its statement of the National Transportation Policy and elsewhere in the Interstate Commerce Act, has enjoined the Commission to preserve each medium of transportation against unlawful and destructive practices and to guard against the consequences of discrimination.

The issue which emerges can be stated, then, as follows: Can equity act in the extreme circumstances where a failure to intervene would result in forfeiture of the complainants' statutory rights under the Interstate Commerce Act because they are threatened with extinction by virtue of conduct which the Interstate Commerce Commission itself has reason to believe unlawful? Or, stated even more succinctly, must the complainants perish because the administrative process has languished?

As we argue below, it is a traditional and a vital function of equity to grant injunctive relief in aid of a principal action pending in another forum when such intervention is essential in order to preserve the *status quo* and to prevent irreparable injury. This is so whether the principal action is one awaiting adjudication in a court of law or before an administrative agency.

The more difficult question—one certainly not free from doubt—is whether the statutory scheme evinces

a purpose to exclude, even in the most extreme circumstances, the possibility of judicial intervention while the case is pending administratively.

In terms, the statute does not answer the question. It places a time limit—seven months, under the presently applicable provision—upon the administrative injunction but does not undertake to state whether the judiciary may thereupon intervene. The grant of limited power to an administrative agency does not necessarily carry with it an implication that all judicial remedies are foreclosed, especially when the grant of injunctive power to the agency is accompanied by a directive which importunes it to complete the case within the prescribed period. It is to be noted additionally that Section 22(1) of the Act undertook to preserve "remedies now existing at common law."

The legislative history, in our view, is inconclusive. For one thing, the principal focus of attention was the conflict between the carriers' position that rate changes should be delayed only for a short period, if at all, and the shippers' position that suspension was a better remedy than damages and should be indefinite in duration. Also, many Congressmen were apparently of the view that the suspension period finally provided by the legislation was adequate to permit completion of the administrative proceedings. One does find, in a few instances, some recognition by individual legislators that this expectation might occasionally fail of fulfillment. Although we think that the statutory seven months' limit upon administrative suspension implies a legislative judgment that there

should be no further delay in putting the rates in effect despite such hardship as might ordinarily be expected to result—a judgment the courts are bound to respect—there was no expressed consensus as to whether it would ever be within the power of an equity court to intervene. We discern no disposition on the part of Congress to preclude that possibility. Rather, we find indications that those who thought about it at all were in disagreement as to the state of existing case law on the subject of enjoining rates and were content, by and large, to leave that question to the courts.

Against this background, we reach the conclusion that the statutory scheme does not, in any and all circumstances, preclude equitable intervention. A fair regard for that scheme, however, does lead us to the view that intervention should be very narrowly confined. For example, if petitioners here were claiming merely a threatened loss of profits, we would say that they should be relegated to the remedy of damages provided in the statute even though it might be less than adequate. We suggest that different considerations apply if there is ground for finding that a competing carrier will be destroyed and others will suffer gross discrimination and injury before the administrative proceeding is terminated.

We point out finally that the course we suggest involves no conflict with the primary jurisdiction of the Commission. The finding that there is reason to believe that the rates here in issue would be unlawful was made by the Commission. The district court re-

frained from re-examining this determination—properly so, we believe, since judicial intervention in the rate-making process, at a preliminary stage, might be disruptive. The court has determined only that there has been an adequate showing that the complainants are threatened with grave and irremediable consequences, and it has ruled only that it would be appropriate (assuming jurisdiction) to preserve the *status quo* until the Commission can make the final determination of legality which is committed to it. In these circumstances, we think that judicial intervention would be in aid of the Commission's jurisdiction and not in derogation of it.

ARGUMENT

THE DISTRICT COURT HAD JURISDICTION TO ENJOIN THE EFFECTIVENESS OF THE RAILROAD'S FILED RATES, PENDING THE COMMISSION'S DETERMINATION OF THEIR VALIDITY, IN ORDER TO PREVENT EXTREME AND IRREPARABLE CHANGES IN THE STATUS QUO AFTER EXPIRATION OF THE STATUTORY SUSPENSION PERIOD

A. GENERAL EQUITY PRINCIPLES SUSTAIN THE POWER OF A FEDERAL DISTRICT COURT TO GRANT ANCILLARY RELIEF PENDING AN ADMINISTRATIVE PROCEEDING

The petitioner in this case invokes an historic office of equity jurisdiction. It has long been recognized that courts of equity have inherent power to grant temporary injunctive relief in aid of, or ancillary to, a principal action in another forum in order to preserve the *status quo* and prevent irreparable injury while the principal action is in progress. This relief was traditionally available whether the main

action was pending in a court of law[3] or in an administrative agency. Thus, when government departments were vested with authority to determine title to property, equity courts restrained waste and trespass pending final determination by the agencies.[4]

A line of relatively recent cases involving the Maritime Commission demonstrates that this historic function of equity jurisdiction has lost none of its vitality. In *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775 (C.A. 2), certiorari dismissed, 336 U.S. 908, a common carrier, alleging irreparable injury, sought to enjoin its competitor from putting into effect certain proposed rate reductions pending a decison by the Maritime Commission as to their validity. The Commission itself intervened in the proceeding on behalf of the plaintiff. The Second Circuit, upholding the grant of an in-

[3] *Erhardt* v. *Boaro*, 113 U.S. 537; *Eastern Oregon Land Co.* v. *Willow River Land Irrigation Co.*, 201 Fed. 203, 211–212 (C.A. 9); *Buskirk* v. *King*, 72 Fed. 22 (C.A. 4); see *Louisville & N.R. Co.* v. *Western Union Telegraph Co.*, 207 Fed. 1 (C.A. 6); 2 Story's *Equity Jurisprudence* (14th ed.) §§ 1232–1235, 1238.

[4] *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568 (S.D. Cal.); *Northern Pac. Ry. Co.* v. *Soderberg*, 86 Fed. 49 (N.D. Wash.); cf. *United States* v. *Parrott*, Fed. Cas. No. 15,998, 27 Fed. Cas. 416 (N.D. Cal.). In *Parrott*, the court demonstrated that equity injunctions were not limited to supplementing actions at law, and were also available in aid of administrative proceedings, by citing the historic grant of such remedy to protect property in litigation in ecclesiastical courts. 27 Fed. Cas. at 423, 425. Equity acted when there was danger of destruction of the property in dispute and "'the powers of the court in which the litigation is depending are insufficient for the purpose.'" 27 Fed. Cas. at 425.

junction, held that the doctrine of primary jurisdiction did not preclude the relief sought because the trial court was being asked "to assist the Commission by preserving the status quo until it could determine * * * how it should act" (170 F. 2d at 779). On the same reasoning, injunctions were granted to maintain the *status quo* pending action by the Maritime Commission in *Isbrandtsen* v. *United States,* 81 F. Supp. 544 (S.D. N.Y.), appeal dismissed, 336 U.S. 941 (despite the fact that the Commission apparently opposed injunctive relief) and *Pennsylvania Motor T. Ass'n* v. *Port of Phila. M.T. Ass'n.,* 183 F. Supp. 910, 916, 917 (E.D. Pa.). An injunction was denied for failure to show irreparable injury in *United States Trucking Corp.* v. *American Export Lines,* 146 F. Supp. 924, 148 F. Supp. 61 (S.D. N.Y.), but the district court evinced no doubt as to its jurisdiction. And recently, when the Court of Appeals for the District of Columbia Circuit held that the Maritime Board had no authority itself to grant an interlocutory stay of a disputed practice before determining its validity, the court set aside the agency's injunction and referred the parties to a proceeding "in a court of equity to seek injunctive relief" *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Board,* 302 F. 2d 875, 880 (C.A. D.C.).[5] See, also,

[5] One agency, the National Labor Relations Board, has specific statutory authority to obtain "appropriate temporary relief or restraining order" from district courts while it considers an unfair labor practice complaint, 29 U.S.C. 160(j); it has been noted that such intervention by a court, ancillary to a proceeding pending in another tribunal, "is of ancient

Board of Governors v. *Transamerica Corp.*, 184 F. 2d 311 (C.A. 9), in which an injunction was granted at the behest of the Federal Reserve Board to prevent the threatened ouster of its jurisdiction to consider the validity of a stock acquisition under the Clayton Act. While the Ninth Circuit acted in aid of its prospective appellate jurisdiction, the court, in a subsequent contempt action, relied upon the analogy of equity jurisdiction and of the *West India* case cited above. 184 F. 2d 319, 325.

The instant case plainly falls within the reach of this traditional ancillary jurisdiction. Under the National Transportation Policy, Appendix, *infra*, pp. 48–49, the Interstate Commerce Commission is charged with the duty "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * * all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, * * *." Petitioners allege that if respondent's rate reductions are allowed to take effect barge transportation on the Tennessee River, together with those industries which depend on that transportation, will be completely destroyed, and communities, such as Guntersville, which owe their welfare to those industries, will be gravely injured. If, as these allegations envisage, the barge lines are driven out of business be-

origin" and contains "no novelty," citing the equity jurisdiction which was discussed above. *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 884 (S.D. Ind.).

fore the Commission can rule upon the lawfulness of the rates, the Commission will be rendered powerless to grant effective relief or to carry out the declared policy of Congress, and the outcome of a bitterly contested economic controversy in which an important public interest is at stake will be determined not by the responsible agency, applying the statutory criterion, but by the force of circumstances. We think it clear that, unless Congress has provided otherwise, a court of equity has inherent power to protect the barge lines against these disastrous consequences and to prevent the paralysis of the Commission's jurisdiction.[6]

B. THE AVAILABILITY OF ANCILLARY RELIEF IN CASES OF EXTRAORDINARY NEED IS COMPATIBLE WITH THE LANGUAGE AND THE LEGISLATIVE HISTORY OF SECTION 15(7)

We have shown that the issuance of injunctive relief to prevent irreparable injury pending the conclusion of an administrative proceeding is a recognized func-

[6] The statutory jurisdiction of a one-judge district court to adjudicate a cause such as this rests upon 28 U.S.C. Section 1337, which confers on the district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce * * *." Jurisdiction here is also based on 28 U.S.C. Section 1331 (federal question) and 28 U.S.C. Section 1332 (diversity of citizenship). We would not exclude the possibility, however, that this action might also have been heard by a three-judge district court (which, by virtue of 28 U.S.C. Section 2325, has sole power to review orders of the Commission) under the "all writs" section, 28 U.S.C. Section 1651, in order to protect its own jurisdiction to review the ultimate Commission order with respect to the proposed rates. Cf. *Board of Governors* v. *Transamerica Corp.*, 184 F. 2d 319 (C.A. 9).

tion of equity courts, and that, on the allegations made by petitioners, there appear to be compelling reasons for granting the requested relief in this case. In adopting and amending the Interstate Commerce Act, Congress did not explicitly rule out such interlocutory judicial intervention. The question is whether such an ouster is to be inferred from the fact that Section 15(7) of the Act empowered the Commission to suspend proposed rates for a limited period of seven months.

In approaching this question, the standard to be applied is the one recently enunciated by this Court in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, No. 37, this Term, decided November 19, 1962, when it considered whether a common law action could be brought for unreasonable charges due to misrouting, despite the absence of any basis therefor in the Motor Carrier Act. A judicial remedy may coexist with a comprehensive regulatory scheme, it was held, when "the exercise of the judicial remedy supports [the Act's] overall purposes and is in nowise inconsistent with the congressional scheme embodied within its four corners" (Slip Op., p. 6). While the question is not without difficulty, we believe that, in the circumstances of this case, the exercise of equity jurisdiction is not inconsistent with, but indeed supports, the congressional scheme for regulation of carriers.

Section 15(7) of the Act, 49 U.S.C. 15(7), Appendix, *infra*, pp. 47–48, provides (a) that the Commission may suspend the operation of a proposed rate

for a period of up to seven months pending a hearing and decision as to the lawfulness of that rate; (b) that if the proceeding has not been concluded by the end of the suspension period, the rate shall go into effect; but (c) that the Commission may require the interested carrier to keep an accurate account of the amounts collected under the proposed rate and, upon completion of the hearing, to make refund of that portion found to be unjustified. In our view, neither the language nor the legislative history of this provision requires the conclusion that, in limiting to seven months the period for which the *Commission* could hold a rate in abeyance, Congress also meant to preclude all possibility of judicial relief after the suspension period had expired. True, the section does provide that at the end of that period "the rate shall go into effect." But this clause can fairly be interpreted as merely laying the foundation for the immediately following provision, contained in the same sentence, that the Commission may require accurate accounts and refunds of overcharges. Viewed in this light, the "going into effect" language is simply part of a comprehensive description of the administrative machinery set in motion when a proposed rate is filed, but is not conclusive of the question of judicial power. Note also, in this connection, the express declaration in Section 22(1) (49 U.S.C. 22(1)), Appendix, *infra*, p. 48, that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law * * *."

The legislative history of 15(7), we think, bears out the conclusion that Congress was concerned with the

administrative treatment of proposed rates during the interim period prior to the ultimate Commission decision, and that it did not address itself to the question whether, in circumstances such as those presented here, traditional equity relief would be available to protect complainants from extreme and irreparable injury. This is not, of course, to say that policy considerations manifest in the administrative scheme are to be disregarded by the courts.

1. *The legislative history and case law prior to 1910*

Prior to 1910 the Commission was without power to postpone the effectiveness of a proposed rate pending an investigation of its lawfulness. Indeed, it was inherent in the statutory scheme that the Commission could take no action at all with respect to a rate until it had already gone into effect. Although the Hepburn Act of 1906, 34 Stat. 584, 589, had clothed the Commission with authority to prescribe maximum rates for the future—rather than merely to condemn existing carrier-made charges and award reparations—this authority could be exercised only upon complaint,[7] and upon a finding that the rate currently "demanded,

[7] It was generally assumed that the complaint could be filed only after the rate had become effective, although the statute (24 Stat. 383–384) did not expressly so provide. See I. Sharfman, *The Interstate Commerce Commission*, p. 50 (1931); 45 Cong. Rec. 2819, 3466, 4711, 5143. In its *Annual Report*, 1908, pp. 11–12, the Commission stated that "complaint cannot be filed with this Commission against a rate which is not in effect, or at least has not been duly published * * *." In some instances, the Commission acted upon complaints relating to rates which, though filed and published, were enjoined from being collected. See fn. 8, *infra*.

charged, or collected" by the carrier was unreasonable, 34 Stat. 589; Appendix, *infra*, pp. 49–50. On its face, therefore, the legislative scheme appeared to offer no opportunity for the exercise of ancillary jurisdiction by an equity court. For if a carrier were enjoined from putting a proposed rate into effect, the Commission would never be in a position to pass upon it; its jurisdiction would be ousted, rather than aided, by the court.[8] Moreover, since the Act did not then require the Commission to make a finding of *prima facie* unlawfulness—such as it now makes when it suspends a rate—the court, under traditional equity standards, would have been forced to conduct its own independent inquiry into the reasonableness of the rate, and, in so doing, to enter an area entrusted to the Commission.

In light of these formidable impediments, it is not surprising that judicial opinion in the lower federal courts, though confused and divided, tended preponderantly to the view that equity had no power to restrain a carrier from giving effect to a proposed rate upon which the Commission had not yet acted. Some courts maintained that equity did have jurisdiction to

[8] See *Houston Coal & Coke Co.* v. *Norfolk & W. Ry. Co.*, 171 Fed. 723, 724–726 (C.C. W.D. Va.), affirmed *per curiam*, 178 Fed. 266 (C.A. 4); *Jewett Bros. & Jewett* v. *Chicago M. & St. P. Ry. Co.*, 156 Fed. 160, 167, 168 (D.S.D.). It appears, however, that despite the statutory requirement that the rate considered by the Commission be one currently "demanded, charged, or collected," the Commission was prepared to pass upon a rate which the carrier had filed and published but which a court had enjoined it from collecting. See the Commission's *Annual Report*, 1908, pp. 11–12, describing *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 158 Fed. 193 (N.D. Ga.).

enjoin the collection of a proposed rate pending a Commission decision, apparently believing that if the rate had been filed and published, the injunction would not impair the Commission's ability to pass upon it.[9] Some even believed it would lie within the power of equity to grant a permanent injunction.[10] The weight of authority, however, was to the contrary. In two instances it was expressly recognized that an injunction could not be merely "ancillary," since its issuance would have the effect of preventing further action by the Commission. *Houston Coal & Coke Co.* v. *Norfolk & W. Ry. Co.*, 171 Fed. 723, 724–726 (W.D. Va.), affirmed per curiam, 178 Fed. 266 (C.A. 4); *Jewett Bros. & Jewett* v. *Chicago, M. & St. P. Ry. Co.*, 156 Fed. 160, 167–168 (D.S.D.) (stating, however, that the court *would* have power to grant a *permanent* injunction, since Congress had given the Commission no authority to deal with a rate which had not gone into effect). Most of the decisions denying the availability of equitable relief,[11] however, rested upon broader grounds. They held that the Interstate Commerce Act affirmatively secured to carriers the right

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[9] *Northern Pac. Ry. Co.* v. *Pacific Coast Lumber Mfrs.' Ass'n*, 165 Fed. 1 (C.A. 9); *Union Pac. Ry. Co.* v. *Oregon & Wash. Lumber Mfrs. Ass'n*, 165 Fed 13 (C.A. 9); *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.*, 158 Fed. 193 (N.D. Ga.).

[10] *Jewett Bros. & Jewett* v. *Chicago M. & St. P. Ry. Co.*, 156 Fed. 160, 166–167 (D.S.D.) (dictum); *Tift* v. *Southern Ry. Co.*, 123 Fed. 789 (S.D. Ga.), affirmed on other grounds, 206 U.S. 428 (1907).

[11] *Columbia Iron & Steel Co.* v. *Kanawha & M. Ry. Co.*, 178 Fed. 261 (C.A. 4); *Wickwire Steel Co.* v. *New York Cent. & H. R. Co.*, 181 Fed. 316 (C.A. 2); *Atlantic Coast Line R. Co.* v. *Macon Grocery Co.*, 166 Fed. 206 (C.A. 5).

to fix rates in the first instance, free of any governmental interference and subject only to liability for reparations if the Commission later found the rates unlawful. In addition, they discerned in this Court's decision in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, a broad rule foreclosing any type of judicial intervention in the ratemaking process prior to the exercise by the Commission of its primary jurisdiction to pass upon the reasonableness of the rates.[12]

We submit that these early lower court cases,

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[12] In the *Abilene* case, this Court held that a shipper could not maintain a common law action to recover damages for excessive interstate freight charges in advance of a decision by the Commission that the rates were unlawful. However, in *Southern Railway Co.* v. *Tift*, 206 U.S. 428, which was also decided prior to the 1910 amendment of the Interstate Commerce Act, the Court made the following comment, by way of dictum, as to the power of a trial court to issue a temporary injunction prior to a Commission decision (p. 437):

> In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in *Texas & Pacific Railroad Company* v. *Abilene Cotton Oil Company*, 204 U.S. 426, upon a different record than that before us. *We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed, is forbidden by the Interstate Commerce Act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates.* The Circuit Court granted no relief prejudicial to appellants on the original bill. * * * [Emphasis added.]

The primary jurisdiction theme sounded in *Abilene* was reiterated in *Baltimore & Ohio Railroad Co.* v. *United States ex rel. Pitcairn Coal Co.*, 215 U.S. 481, which was also relied upon in the Second and Fourth Circuit cases cited in fn. 6, *supra*.

though possibly correct in result, should be given little weight here. For, as we have shown, they were decided under a statutory scheme which, in terms at least, made it impossible for a court of equity to stay the effectiveness of a rate except by drastically interfering with the primary jurisdiction of the Commission.[13]

2. The Mann-Elkins Act of 1910

The suspension power was added to the statutory scheme by Section 12 of the Mann-Elkins Act of 1910 (36 Stat. 539, 552), Appendix, *infra*, pp. 49–50. That provision authorized the Commission (a) to initiate an investigation immediately after the filing of a proposed rate (instead of waiting for a complaint after the rate had already become effective); (b) by an order stating its reasons, to postpone the effective date of the rate for a maximum period of 120 days; and (c) if it had not been able to complete its investigation by then, to continue the suspension for an additional period not to exceed six months. The effect of this measure—we do not say its purpose—was to remove the impediments to the exercise of ancillary equity jurisdiction which had been inherent in the previous statutory scheme. For it was now possible for a court to issue an interlocutory injunction without making a preliminary finding as to reasonableness of the rate (the Commission already having done this) and without placing in doubt the Commission's own power to pass upon the rate.

There was very little opposition to the basic proposal that the Commission be given some degree of

[13] As we point out *infra*, pp. 40–43, there is no threat of interference with primary jurisdiction in the situation presented by the case at bar.

authority to hold rates in suspense, for it was generally recognized that the reparations remedy did not adequately protect shippers against excessive freight charges. S. Rep. 355, 61st Cong., 2d Sess., pp. 8–9. See 45 Cong. Rec. 2819. The chief subject of controversy was whether the suspension should be limited to a fixed period, after which the rate would take effect even if the Commission had not yet completed its investigation, or whether it should be indefinite in duration, continuing until the Commission had rendered its decision, however much time that might require. Senator Cummins (a member of the Committee on Interstate and Foreign Commerce), the principal advocate of indefinite suspension, introduced an amendment to delete from the original bill (as amended) a provision limiting the suspension period to a maximum of 120 days and to provide, instead, that no increased rate should go into effect until the Commission had found it just and reasonable.[14] A similar amendment was proposed in the House by Representative Madden. 45 Cong. Rec. 5843. In support of his amendment, Senator Cummins argued that a limited suspension period would invite the railroads to inundate the Commission with rate increases, and, by means of this and other dilatory tactics, prevent the Commission from passing on the rates until long after they had gone into effect. 45

[14] 45 Cong. Rec. 6499. As originally reported, Section 9 of the bill authorized the Commission to suspend the operation of a rate for a period not to exceed 60 days. S. 6737, Section 9, 61st Cong., 2d Sess.; 45 Cong. Rec. 2819. At the outset of the floor debate on this provision, an amendment by Senator Aldrich doubled the 60-day period to 120 days. 45 Cong. Rec. 6464.

Cong. Rec. 6502, 6500, 6781. He further urged that the burden of administrative delay should be borne by the railroads, rather than the shippers, since the carriers were better able to afford it, 45 Cong. Rec. 6510–6511. The proponents of limited suspension maintained that the period would, in the generality of cases, be enough to enable the Commission to render its decision; that, unless the Commission were under some pressure to act diligently, it might abuse the suspension power by allowing proceedings to be prolonged indefinitely; and that to suspend a rate indefinitely would raise serious constitutional problems. *E.g.* 45 Cong. Rec. 2819, 3472, 5847–5849, 6784, 6917. The most significant objection to the Cummins amendment, however, was probably the one raised by Senator Jones, who pointed out that whereas a shipper could recover reparations if a rate permitted to go into effect were later found excessive, the railroad had no remedy to recoup its lost revenues if a suspended rate ultimately proved lawful. 45 Cong. Rec. 6782, 6783. Both the Cummins amendment in the Senate and the Madden amendment in the House were defeated. 45 Cong. Rec. 6915, 5850. An amendment offered by Senator Jones, extending the 120-day suspension for an additional six months, was adopted by the Senate, 45 Cong. Rec. 6921, and after conference by the House. H. Rep. No. 1588, 61st Cong., 2d Sess.; 45 Cong. Rec. 8134, 8142. It was thought that this period would allow the Commission ample opportunity to complete its hearings, yet at the same time not be unduly burdensome to the railroads. 45 Cong. Rec. 6917.

During the course of the debates there was very little discussion as to whether a shipper threatened with extreme and irreparable injury by a new rate might—either under prior law or under the proposed new legislation—obtain injunctive relief in an equity court pending the Commission's decision. In the House debates, three comments are pertinent. Representative Mann (Chairman of the House Committee on Interstate and Foreign Commerce and author of the House bill) observed that "under existing law there is no method by which you can prevent the proposed new rate continuing in force while the commission is investigating the subject as to whether the rate ought to remain in force." 45 Cong. Rec. 4711. It is not clear, however, whether Representative Mann was referring merely to the absence of any administrative suspension power in the regulatory scheme itself, or whether he meant that there was no judicial remedy either.[15] Representative Needham clearly stated that a judicial remedy was available under prior law (45 Cong. Rec. 5847):

> * * * The remedy which the shipper now has is both to go into court and enjoin such contemplated action by the railroad company, and thereafter bring his action before the Interstate Commerce Commission.
>
> * * * It seems a useless and unnecessary

[15] The same ambiguity clouds several statements in the debates that, at the end of the suspension period, the rates "go into effect." *E.g.*, 45 Cong. Rec. 3472, 6500; 6916–17. Similar language is now expressly set forth in Section 15(7). As indicated *supra*, p. 22, we interpret that language to mean that the rates go into effect so far *as the administrative process is concerned.*

> expense to compel a shipper to go into court and enjoin the railroad company whenever he desires to prevent the inauguration of a new rate, classification, regulation, or practice, and it seems but reasonable to clothe the Interstate Commerce Commission with the power in the first instance to suspend such action on the part of the carrier until the justness or reasonableness of the contemplated action may be heard and determined.

The opposite view was expressed by Representative Cole, who declared (45 Cong. Rec. App. 88):

> * * * This exercise of discretion [by the Commission] is wisely proposed, since courts are without authority to suspend a rate pending the determination of the reasonableness of the rate by the Commission. See Abilene Cotton Oil Company *v.* T. & P. Ry. Co. (204 U.S., 426), in which it was held that the commission alone has power to entertain original proceedings for the alteration of an established schedule.

The debates on the Cummins amendment produced a pertinent exchange between Senator Cummins and Senator Heyburn, an advocate of limited suspension. 45 Cong. Rec. 6777. Responding to Senator Cummins' suggestion that the railroads might adopt tactics that would prolong administrative proceedings beyond a limited suspension period, Senator Heyburn inquired whether "at the stage of the proceedings just pictured by the Senator, where the railroads would bring in such a vast mass of material as to make it impossible for the decision to be rendered within the limit, the parties might not go into a court of equity,

and, setting forth those facts, ask that the rates be not put in force because of the wrongful act of the railroad company." Senator Cummins replied that he had "very grave doubt about the right of any shipper to institute a suit of that kind," but that even if there were one, "I for one am not by my vote going to put any such burden upon the shippers of the country." Later in the debates Senator Heyburn clearly indicated his understanding that equitable relief had been available in the circut courts and would, under the proposed bill, be available in the newly created Commerce Court.[16]

Finally, there were fleeting references to the subject of equity jurisdiction in connection with an amendment, proposed by Senator LaFollette, which would

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[16] Senator Heyburn's remarks were as follows (45 Cong. Rec. 6793–6794):

> Under the provisions of the bill the court is invested with jurisdiction to hear and determine an application for an injunction at any time; you do not need to wait four months [the suspension period] at all. If an injustice is being done to a citizen of this country for which there is no adequate legal remedy, he may always go into a court of equity and ask for relief. * * * The courts of equity in this country have never failed to administer justice in those cases where there was no convenient or adequate remedy at law.
>
> * * * *Under the statute, should the bill be enacted into law, the shipper may still go into the court, the United States circuit court now, the court created by the bill then.* As he presented his facts in the shape of a bill or petition the court would investigate; and if he alleged that he was wronged by reason of the impossibility of getting action in the courts of law, the court of equity would say, "We will see that you are not destroyed before the law," and reach out its hand and rescue him. [Emphasis added.]

have given the newly created Commerce Court [17] jurisdiction over:

> * * * All suits brought by any shipper or other interested person to suspend or enjoin any rate or rates, or advance in rates filed by any common carrier with the Interstate Commerce Commission, pending a final determination by said commission as to the reasonableness of such rate or rates in a then pending proceeding before said commission, where it shall be made to appear to such commerce court that the enforcement of such rate or rates will result in a deprivation of the complainant's property without due process of law, or without compensation in violation of the fifth amendment to the Constitution of the United States; or wherein it may be made to appear that the enforcement of such rate or rates will result in irreparable injury to the complainant, and that the said Interstate Commerce Commission has not suspended, or has not the power to suspend the enforcement of such rate or rates before the final determination as to the reasonableness of such rates in such pending proceeding before said commission [45 Cong. Rec. 7260].

This amendment, which was defeated, would thus have conferred upon the Commerce Court the power at

[17] The Commerce Court was a specialized tribunal of five judges, which Congress established by the Mann-Elkins Act, 36 Stat. 539–544, and to which it transferred most of the power to review decisions of the Interstate Commerce Commission which had previously been exercised by the circuit courts. The Commerce Court was abolished in 1914 by the Urgent Deficiencies Act, 38 Stat. 219, and its powers of review placed in the hands of three-judge district courts.

issue here, to preserve the *status quo* after the exhaustion of the Commission's suspension power. But it would also have gone far beyond this limited judicial intervention. Senator LaFollette frankly acknowledged that his intention was to give shippers and members of the public the right to resort to the Commerce Court at any time, even when the Commission had declined to suspend, and the right to litigate in that forum the very issue of unreasonableness simultaneously pending before the Commission (45 Cong. Rec. 7260–7261). The LaFollette amendment was assailed by Senator Sutherland on the grounds that it would usurp the Commission's primary jurisdiction and that the administrative remedies provided by the Commission were adequate (45 Cong. Rec. 7261). In that connection he intimated that the administrative remedy was exclusive: "But pending the determination of the Interstate Commerce Commission, which is constituted for this precise purpose, I see no reason whatever for extending to the shipper the right to go to court" (45 Cong. Rec. 7261). Senator Burton, on the other hand, objected to the amendment because there was already "ample opportunity" for the shipper to obtain relief "both before the Interstate Commerce Commission and the general courts of the country" (45 Cong. Rec. 7262). And Senator Elkins, Chairman of the Committee on Interstate and Foreign Commerce and author of the Senate bill, pointed both to the statutory remedies and to the availability of equity relief. He stated (45 Cong. Rec. 7263):

> If anyone deprives a citizen or any common carrier or anybody else of property without due process of law or without compensation, in violation of the fifth amendment, the aggrieved party has a right to go into any of the courts of the United States and seek relief. The same is true in the case of any irreparable injury. Anyone can go into a court in a case where irreparable injury is about to be perpetrated and get an injunction.

This legislative history, we submit, affords no basis for the conclusion that Congress "intended" to foreclose a judicial remedy. Rather, it suggests that, in fashioning an administrative suspension procedure, Congress failed to resolve the question of the effect that this innovation might have upon the role of the courts. There was no consensus, and only peripheral comment, as to the power of equity to postpone the operation of a rate, either under prior law or under the contemplated new legislation. Certainly, however, Congress showed no disposition to oust equity jurisdiction from the field if, under traditional principles, it would attach.

Nor did the rejection of the Cummins Amendment and the adoption, instead, of an administrative suspension period limited to ten months, imply any purpose to shield the proposed rate from all possibility of judicial restraint. It is one thing to provide that rates should not be held in abeyance indefinitely by the summary and unreviewable action of an administrative agency, taken upon its own initiative and without any compelling showing of need by the party opposing the rate. It is quite another to erect an

absolute barrier to the power of an equity court, in extreme circumstances, to protect a petitioner from the possibly disastrous consequences of an unlawful rate. The fact that Congress rejected a proposal which contemplated the Commission's automatic suspension of every rate increase for an indefinite period does not mean that it wished to disable the courts from intervening, however exigent the circumstances.

As we read the history, Congress attached significance, on the one hand, to the inability of carriers to recover revenues lost during a period of suspension. It also recognized, on the other, the ordinary hardships which a shipper might suffer if compelled, during an interim period, to pay unjust rates. Discrimination or increased costs might mean a loss of business, and reparations might prove a slow and an incomplete remedy. By placing a limit upon the period of suspension, Congress adopted a compromise. The initial burden would fall upon the carriers who, it was thought, were best able to bear it. After a prescribed period (if the administrative proceedings had not yet been completed), the burden would shift. But we find no intimation that the carriers were to be free to shift a burden of such proportions that it would sink those who attempted to sustain it and destroy them before their statutory rights could be determined. We conclude, therefore, that the policy implicit in the statutory compromise calls for judicial abstention in the ordinary situation, but not in the case where the gravity and magnitude of the threat are of such proportions as to demand intervention.

3. Subsequent amendments of section 15(7)

Little further light is cast on the instant problem by subsequent amendments to the suspension provision.[18]

In the Esch-Cummins Act of 1920, Congress amended Section 15(7) by reducing the second suspension period (which the Commission could invoke if it had not completed its hearing within the initial 120-day period) from six months to 30 days. Congress also authorized the Commission (i) to direct carriers to keep accurate account of receipts attributable to rate increases which go into effect at the end of the suspension period and (ii) at the conclusion of the hearing, to order refunds to the extent the rate

[18] Of passing interest only are two measures enacted by Congress during the first World War period. In 1916 the President assumed control of the railroads as a wartime measure (39 Stat. 645). Since Congress did not authorize the President to initiate rates until 1918, it sought to forestall any large number of rate increases by providing in 1917 that until January 1, 1920, "no increased rate * * * shall be filed except after approval thereof has been secured from the commission." (40 Stat. 270, 272). This provision grew out of a broader proposal that was introduced in the Senate to provide that the commission should suspend all rate increases for the duration of the hearing thereon and that rates should "take effect only after the Commission has found and declared the same to be just and reasonable." This amendment was defeated in the House (55 Cong. Rec. 4385–86), but upon insistence of the Senate, a compromise was agreed to which limited the provision to apply only to January 1, 1920 (see 55 Cong. Rec. 5810). The Federal Control Act of 1918 authorized the President to initiate rates by filing them with the Interstate Commerce Commission. The rates were to take effect at the time directed by the President, and the Commission had no power to suspend them before a final determination (40 Stat. 456).

was found unjustified. Appendix, *infra*, p. 50. See H. Rep. 650, 66th Cong., 2d Sess., p. 66.[19]

With regard to the suspension period, Senator Cummins stated on the Senate floor that "the only change that is of importance at the moment is in the length of time that the commission may suspend rates which are filed by the carrier." 59 Cong. Rec. 143. He explained that since Congress had relieved the Commission of many of its duties by establishment of the Transportation Board, the Commission should be able to pass upon rates within the shorter time (*ibid.*).

There was, to be sure, further discussion of the competing considerations. In the House hearings, ICC Commissioner Clarke urged reduction of the suspension period because the railroads were forced to stand an unreasonable loss if the rates were finally found just and reasonable, while the shippers could obtain reparations if they were not. The combination of a shorter suspension and the new refund arrangement, he said, would protect carriers against "unreasonable delay" and protect shippers by assuring and simplifying the recovery of reparations. Hearings on H. 4378 Before the House Committee on Foreign and Interstate Commerce, 66th Cong., 1st Sess., vol. 1, pp. 30–31. See also the discussion of the bill by Representative Esch in similar terms, 58 Cong. Rec. 8317. For an opposing view, see Hearings, vol. 2, pp. 1626–

[19] As amended in 1927, and as presently in effect, the relevant language of Section 15(7) reads as follows:

> If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; * * *.

1627, where a witness representing an association of federal and state regulatory bodies urged that the shipper was not adequately protected by reparations and that a longer suspension was needed.

The 1920 Act also added to Section 15(7) the language providing that, at the end of the suspension period, "the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect * * *." Appendix, *infra*, p. 51. The legislative history contains no intimation that these words added anything to the law as it then existed. Congress understood, when it passed the Mann-Elkins Act in 1910, that the rates would go into effect at the expiration of the suspension period without the need for further filing or order. *E.g.*, 45 Cong. Rec. 6916–6917. The quoted clause was evidently inserted in 1920 in order to introduce the provision immediately following—that granting the Commission authority to place a condition upon the collection of increased rates which go into effect upon the expiration of suspension.

In 1927, Section 15(7) was modified to provide for only a single suspension period, which was enlarged to seven months. 44 Stat. 1448. This enlargement was proposed by the Commission, which had found itself unable to complete some proceedings within the previously allotted time. S. Rep. 1508, 69th Cong., 2d Sess., p. 4; H. Rep. 1214, 69th Cong., 1st Sess., p. 4. As petitioners note (Brief, p. 22), the fortuitous result of the 1927 revision, which is still in effect, was to make more conspicuous the statement that the rates "shall go into effect" at the end of the suspension

period.[19] Again, no inference relevant to the present issue can be drawn from this change.

C. THE GRANTING OF AN INTERLOCUTORY INJUNCTION WOULD NOT CONFLICT WITH PRINCIPLES OF PRIMARY JURISDICTION

The doctrine of primary jurisdiction, contrary to the dictum of the court below, poses no obstacle to the exercise of the equity power invoked here.[20] The

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[20] In *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U.S. 412, decided in 1930, this Court observed (at pp. 429–430) that—

> When, before the amendments of 1910 of the Interstate Commerce Act, the question arose as to the propriety of judicial action in granting injunctions against the maintenance of interstate rates, filed and published by carriers as provided by law, pending the decision of the Interstate Commerce Commission whether such rates were unreasonable or unjustly discriminatory, there was a conflict of opinion in the lower Federal courts, but the weight of decision was that such relief, although temporary in character, could not be granted prior to an appropriate finding by the Interstate Commerce Commission, and this ruling accorded with the principle declared by this Court in the *Abilene* and other cases, *supra*. Congress, in 1910, authorized the Interstate Commerce Commission, on the filing of rates by interstate carriers with the Commission, to suspend the operation of the rates for a stated period, and this provision has been continued in later legislation. Interstate Commerce Act, Sec. 15(7); 36 Stat. 552; 41 Stat. 486, 487. This power of suspension was entrusted to the Commission only. There is no similar provision for the suspension of intrastate rates established by state authority.

That portion of the above quotation which is descriptive of the case law prior to 1910 is, for reasons we have suggested *supra*, pp. 23–24, 27, inapplicable to the statutory scheme of today. Insofar as the Court might have been intimating, however, that judicial intervention was impermissible even after 1910, we

purpose of that doctrine is to remove from initial consideration by the courts those issues which "under a regulatory scheme, have been placed within the special competence of an administrative body * * *." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 64; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. In the present case, the pertinent issues within the Commission's authority were (i) whether to suspend the proposed rates in the first instance and (ii) whether the rates are lawful. It is plain that in granting the requested injunction the court would in no way interfere with the administrative resolution of either of these questions. For the Commission has already exhausted its statutory power to suspend.[21]

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think this dictum must be read in the light of the particular issue involved in *Great Northern*. There, the Court reversed the grant of an interlocutory injunction against certain intrastate rates which had been prescribed by a state regulatory agency and which the railroads were challenging before the Commission as unjustly discriminatory against interstate commerce. If the Commission so found, it had authority to set the rates aside, but it had no interlocutory power to suspend intrastate rates under 15(7) (281 U.S. at 429-430). The railroads' contention that an equity injunction should be granted in aid of the Commission proceedings was rejected on the ground that such an order would interfere with the State's undoubted regulatory authority, which could be overriden only in the manner provided by Congress—*i.e.*, after the Commission had found unjust discrimination against interstate commerce (281 U.S. at 426-428, 430). The instant case presents no such conflict between federal and state, or between judicial and administrative, authority.

[21] We would not urge that a court may enjoin a rate where the Commission has elected not to suspend it. The district courts have held themselves without power to entertain an action for a judicial stay in lieu of the Commission suspension, when the Commission refused to suspend. *Algoma Coal &*

And it will retain full and exclusive authority to decide the ultimate merits, *i.e.*, the lawfulness of the proposed rates, if an interlocutory injunction is issued.

We point out further that the factors which the court must weigh in deciding whether to issue an injunction are discrete from those the Commission considers in deciding whether to suspend, or, ultimately, whether to approve a rate. The nature of the supporting findings which the Commission makes when it suspends a rate is illustrated by the statement it made here: "There is reason to believe that [the rates] would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act, and con-

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Coke Co. v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Birmingham Slag Co.* v. *United States*, 11 F. Supp. 486 (N.D. Ala.). Review by a three-judge court of a Commission decision to grant or deny suspension has also been denied, either on ground of lack of jurisdiction (*Luckenbach Steamship Co.* v. *United States*, 179 F. Supp. 605 (D. Del.); *Carlsen* v. *United States*, 107 F. Supp. 398 (S.D. N.Y.)) or because the matter is committed to agency discretion (*Consolidated Truck Service, Inc.* v. *United States*, 193 F. Supp. 773 (D. N.J.); *Merchant Truckmen's Bureau of New York* v. *United States*, 16 F. Supp. 998 (S.D. N.Y.)). Other courts have indicated that jurisdiction would exist to correct action plainly contrary to the statute (*Long Island Railroad Co.* v. *United States*, 193 F. Supp. 795 (E.D. N.Y.); cf. *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63 (N.D. Ohio); *Seatrain Lines* v. *United States*, 168 F. Supp. 819 (S.D. N.Y.)). Under another regulatory statute, one court has reviewed and corrected a Federal Power Commission suspension order on ground of an abuse of discretion in fixing the date from which the suspension ran. *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 201 F. 2d 568 (C.A. 4).

stitute unfair and destructive competitive practices in contravention of the National Transportation Policy * * *." These preliminary findings, we submit, make it unnecessary for the equity court to undertake its own independent inquiry into the likelihood that petitioner will succeed on the merits—an inquiry which might encroach upon the agency's primary jurisdiction. The court, we suggest, would be confined to the traditional task of balancing the equities—an evaluation to be undertaken, of course, in the light of the relevant statutory policies. The determination of the court would neither duplicate nor anticipate any decision of the Commission.

If anything, the doctrine of primary jurisdiction underscores the importance of the ancillary and protective relief sought here. At common law, the carrier's freedom to set rates was held in check by the power of equity to enjoin discriminatory practices and restraints of trade and by the power of a court of law to exact damages. The passage of the Interstate Commerce Act and the doctrine of primary jurisdiction have withdrawn from judicial scrutiny many traditional aspects of common carrier liability. Moreover, in order to maintain "the unity of the system of regulation" Congress excluded from the scope of private injunction suits under the antitrust laws "a wrong within the jurisdiction of the Interstate Commerce Commission." *Terminal Warehouse Co.* v. *Pennsylvania Railroad Co.*, 297 U.S. 500, 513. Section 16 of the Clayton Act, 15 U.S.C. 26. With injured parties now so largely dependent upon the

remedies afforded by the Commission, it becomes increasingly important that the Act be effectively administered and that equity have power to protect the agency's jurisdiction by preventing irreversible changes in the *status quo* pending Commission decision. Cf. *West India Fruit & Steamship Co.* v. *Seatrain Lines*, 170 F. 2d 775, 779 (C.A. 2), certiorari dismissed, 336 U.S. 908.

CONCLUSION

We have attempted to demonstrate that the statutory scheme does not in all circumstances preclude the availability of injunctive relief *pendente lite*. As we have further indicated, however, such judicial intervention should be confined to situations in which the threatened injury is of extraordinary magnitude. In the "garden variety" case in which a shipper seeks merely to be relieved of the burden of excessive freight charges during the interim period, it is fair to conclude that there should be no deviation from the statutory compromise implicit in Section 15(7) and in its history. The shipper should be relegated to reparations or damages, even though, under normal equity principles, that remedy might be deemed "inadequate." In a case where a rate is challenged as discriminatory or destructively competitive, there may be reason to apprehend somewhat greater injury. Even there, however, the shipper or competing carrier should be required to show that the potential consequences are more drastic than a temporary loss of profits or diversion of traffic. We suggest

that, in light of the congressional policy, nothing less than a showing of impending destruction of the complainant will suffice to warrant the intervention of equity.

Nor is it our position that, if jurisdiction be established, the petitioners' right to equitable relief is a foregone conclusion. Important equities freight the other side of the balance as well. First, of course, there is the unrecoverable loss of revenues to the railroads, a factor which will be present in every case in which the court is asked to enjoin proposed rates from taking effect. In addition, however, it is urged by Statesville Flour Mills, in its brief *amicus curiae*, that it and other shippers similarly situated have made large purchases of grain in anticipation of using the proposed multiple car rates, and that the continuing postponement of the rates has subjected those businesses to paralyzing uncertainties and deprived them irreparably of the benefits of the reduced transportation charges. (See also R. 28–30.) The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners contend that to stay the effectiveness of the low multiple car rates would damage large numbers of producers, processors, and consumers in the South (R. 30–32). And the railroads have introduced affidavits contesting petitioners' claim that the multiple car rates will destroy barge traffic on the Tennessee River. *Supra*, pp. 7–8. If the case is remanded, it will be the task of the district court to balance these competing interests and to appraise the magnitude of the

threatened injury in light of the exacting standard which we think must govern the availability of injunctive relief in these cases. Relief, if granted, might be accompanied by appropriate conditions, such as the posting of a suitable bond. Obviously, this Court, at this stage, cannot anticipate the outcome of the lower courts' appraisal. We suggest only that petitioners' compelling showing of potential injury is a sufficient basis upon which to invoke the aid of an equity court and that they are entitled to the exercise of the district court's discretion in further proceedings.

Accordingly, we respectfully submit that the judgment of the court of appeals should be reversed and the case remanded to the district court for further consideration under appropriate standards to be enunciated by this Court.

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DECEMBER 1962.

APPENDIX

The relevant current provisions of the Interstate Commerce Act, 24 Stat. 379, 384, as amended, are as follows:

Sec. 15(7), 49 U.S.C. 15(7):

> Whenever there shall be filed with the Commission any schedule * * * the Commission shall have, and it is given, authority, * * * to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts

received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *

Sec. 22(1), 49 U.S.C. 22(1):

> * * * and nothing in this part contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this part are in addition to such remedies; * * *

National Transportation Policy, note preceding 49 U.S.C. 1:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this act shall be administered and enforced

with a view to carrying out the above declaration of policy.

Relevant prior versions of what is now Section 15 (7) of the Interstate Commerce Act are as follows:

Hepburn Act (1906), 34 Stat. 589, Sec. 4 amending Sec. 15:

> That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. * * *

Mann-Elkins Act (1910), 36 Stat. 552, Sec. 12 amending Sec. 15:

* * * * * * *

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. * * *

Esch-Cummins Act (1920), 41 Stat. 486–87, Sec. 418 amending Sec. 15(7):

* * * * * * *

* * * and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. * * *

Mayfield-Newton Act (1927), 44 Stat. 1447–48, Sec. 2 amending Sec. 15(7):

* * * * * * *

* * * and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. * * *

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